

GUJARAT HIGH COURT

Manka Hari

Vs.

State of Gujarat

Criminal Appeal No. 869 of 1966, against judgment and order of City Magistrate, 8th court, Ahmadabad, in C. R. No. 105 of 1966.

(A.S. Sarela, J.)

16.01.1967

JUDGMENT

A.S. Sarela, J.

1. The appellant has been convicted on 5-10-1966 by the City Magistrate, 8th Court, Ahmedabad, for an offence under Section 16(1)(a)(i) read with Section 7 of the Prevention of Food Adulteration Act, 1954, (hereinafter referred to as 'the Act') for selling adulterated milk. He has been sentenced to rigorous imprisonment for six months and a fine of Rs. 1000 in default of payment of which to undergo further rigorous imprisonment for two months.

2. The prosecution case is set out in the deposition of the food inspector Shri P.S. Sharma (Exh. 2). He states that on 17-1-1966 at about 6-15 A.M. when he was near the Asarwa Government Quarters with his peon Pawar he saw the appellant passing with a can containing milk and stopped him. The appellant had milk and measures with him. He called one Babulal Mohanlal and then asked the appellant about the quality and rate of the milk. The appellant told him that it was cow's milk and the rate was 6 P. per 100 ml. Sharma purchased 700 mis. of milk for 42 P. and gave the appellant the duplicate copy of the intimation informing him that he as food inspector was taking the milk as sample for analysis. On the original of that intimation (Exh. 3) he obtained the thumb mark of the appellant. He divided true sample so taken into three bottles in each of which he added 16 drops of formalin. He then corked, sealed and labelled the bottles and obtained the signature of the panch Babulal Mohanlal on the labels and he also himself signed them. He wrapped all the bottles with thick paper and sealed them, obtained the signature of the panch on the wrappers and he also signed them. He gave one bottle to the appellant and obtained receipt (Exh. 4) for that bottle and also for the money paid by him. The receipt was attested by Babulal Mohanlal He identifies the thumb mark of the appellant on that receipt. Sharma proceeds to state that thereafter at about 11-30 A.M. he handed over one of the two bottles left with him

with the necessary memo and specimen of seal impressions to Shri Vaghela, who is of the office of the public analyst. Later he received the report of the public analyst showing that the milk was adulterated. He goes on to add that he then obtained the necessary sanction from the competent authority namely Dr. A.P. Dixit and filed the complaint. That sanction has been produced. Alongwith the complaint he sent to the court one of the bottles remaining with him and he identifier that bottle (article A) as also the wrapper on that bottle The complaint Exh. 1 which he filed in Court on 6-5-1966 alleges that the appellant old adulterated milk with 14% of water and 37 p.c. less milk fat and that whereas the total solid non-fat should be 8.5% it was in fact 7.8 p.c. and whereas the milk fat should be 3.5 p.c. it was in fact 2.2%.

3. Before referring to the appellant's case it will be convenient to refer to the report of the public analyst. In that report which is at Exh. 5 the public analyst states that he received on the 17th of January 1966 from Shri P.S. Sharma, food inspector a sample of cow's milk taken on the morning of 17-1-66 properly sealed and fastened and that he found the seal intact and unbroken. In the report the result of the analysis is stated as disclosing 2.2% fat and 7.3 p.c. total solids non-fat and the report states that the fat deficiency was 37% and the addition of water was 14%. The report mentions that the sample sent contained formalin added as per rules by the food inspector. Shri Vaghela to whom the sample bottle was handed over by Sharma and who is as assistant to the principal Chemist was also examined at Exh. 13. I shall refer to his testimony later.

4. The defense of the appellant was a total denial that he sold milk to the food inspector Sharma or that he received Exh. 3 or Exh. 4 or that he has signed any of those documents. He was unable to say why he was falsely implicated.

5. In the lower court the principal witness was the food inspector Sharma who in his deposition stated what has been earlier bet out. To corroborate him in respect of what occurred at the time the sample was taken two witnesses were examined namely Dinkar Pawar (Exh. 17) and the panch Babulal Mohanlal (Exh. 11). Babulal did not support him. While admitting that he was called by Sharma at about 6-30 A.M. on New Mental Road, he denied seeing any milkman. He admitted having attested the receipt Exh. 4 but stated that there was no thumb mark on it meaning the thumb mark of the milk vendor. He first was unable to say whether the contents of that receipt were false but later on he stated that they were correct. He admitted having signed the labels and wrappers on article A and the other bottles, but was unable to say what were the contents of the bottle or bottles. He stated that there were three bottles and one peon was sealing them and that the wrapper was placed after he had signed the lables on the bottles. Witness Pawar substantially corroborated the food inspector Sharma in all material particulars of Sharma's story Witness Vaghela, to whom I have earlier referred, stated that he was working with the principal Chemist in the Public Health Laboratory and that on 17-1-1966 at about 11-30 A.M. he received four samples from Sharma. It appears that Sharma had detected four cases on that day. The sample No. 3 was of the present case. Vaghela states that Sharma gave him a memo and specimen of seals and he compared the seals on the container and the wrapper with the specimen

and found that they tallied, and that the seals were intact and unbroken and the sample was fit for examination. He further states that he examined the sample under the supervision of Dr. Vyas who is his superior. Of these witnesses Sharma and Pawar were cross-examined to suggest that they must be committing a mistake in identifying the appellant as the milk vendor from whom the milk was taken for analysis.

6. The lower court rejected the defence theory that the appellant was not the vendor. It was urged before the lower court that as the panch did not support the prosecution the mandatory provisions of Sub-Section (7) of Section 10 of the Act cannot be said to have been complied with and the court cannot act on the evidence of the remaining witnesses. The court rejected that submission. The report of the public analyst was not challenged in the lower court. In the result the appellant was convicted and sentenced as earlier stated and against that conviction and sentence he has come in appeal to this court.

7. Mr. Thakore who argued the appeal on behalf of the appellant did not go to the extreme length of urging that the person from whom the milk was taken by Sharma for the purpose of analysis was not the appellant. His first submission was that there was no evidence to prove that Sharma was duly appointed as and properly qualified to be a food inspector. He urged that Section 9 of the Act requires that the appointment of a food inspector shall be made by the Central Government or the State Government by a notification in the official gazette and that he shall have the prescribed qualifications to be the food inspector in the local area assigned to him by the Central Government or the State Government as the case may be. He also referred to rule 8 of the Prevention of Food Adulteration Rules, 1955, (hereinafter referred to as the rules) made by the Central Government under Section 23 of the Act and stated that no evidence had been led to show that Sharma had the qualifications of a food inspector as laid down by that rule. His second submission was that in this case there has been a non-compliance with the provisions of Sub-Section (7) of Section 10 of the Act. He argued that when a food inspector takes a sample of any article of food in exercise of his powers under Sub-Section (1) of Section 10 he is required by Sub-Section (7) of Section 10 to call one or more persons to be present at the time when such action is taken and take his or their signatures. His submission is that if the person so called does not support the food inspector in the court of law it must be held that there is non-compliance by the food inspector with the provisions of Sub-Section (7) of Section 10 of the Act. His third submission was that the food inspector in this case has failed to comply with the provisions of rule 16, particularly clauses (b) and (c) of that rule, in so far as the sample taken was not proved to have been packed and sealed in the manner provided by those clauses. His last submission was that in order to eliminate any doubt on the question whether the sample that reached the public analyst was the very sample that was taken from the milk vendor by the food inspector it is necessary that paper slips signed by the panch should be affixed on the sample bottle in addition to the seal of the food inspector and this was not proved to have been done in the present case. and he generally submitted that the evidence in the case left doubt as to the identity of the sample examined by the public analyst. He also urged that the report of the public analyst in this case

should not carry weight. On the basis of these submissions Mr. Thakore argued that it was unsafe having regard to these failures on the part of the prosecution to convict the appellant in the present case.

8. The first submission of Mr. Thakore may be dealt with in brief. Section 9 of the Act which provides for the appointment of a food inspector provides that the Central Government or the State Government may by notification in the official gazette appoint such persons as it thinks fit having the prescribed qualifications to be food inspectors for such local areas as may be assigned to them by the Central Government or the State Government as the case may be. There is a proviso that no person who has any financial interest in the manufacture, import or sale of any article of food shall be so appointed. Rule 8 of the rules lays down the qualifications of a food inspector. Certain alternative academic qualifications are provided for. There is also a proviso under which in the absence of prescribed academic qualifications persons having the training and experience specified may be appointed as food inspectors. Mr. Thakore's argument is that there is no evidence led to prove that the appointment has been made either by the Central Government or the State Government as required by section 9 or that the appointee in the present case had any of the qualifications laid down under rule 8. Now, both these questions are questions of fact and ought to have been agitated in the trial court. But no such point was taken in the trial court. In the memo of appeal the point as to qualifications has no doubt been taken but the point that there was no evidence of appointment by a competent authority has not been taken. These contentions taken in the appeal have nothing to do with the ingredients of the offence and as they are entirely factual, unless they are taken in the trial court and the other side is called soon to place before the court evidence on those points, it is not possible to consider them at this stage. Nevertheless in this case there is evidence to indicate that Sharma is a duly appointed food inspector. In the complaint Exh. 1 he has described himself as the food inspector. The complaint is endorsed by the sanctioning authority namely the Medical Officer of Health of the Ahmedabad Municipal Corporation. It is not unreasonable to assume that the sanctioning authority would not accord sanction if Sharma was not a duly appointed food inspector. The fact that the Medical Officer of Health of the Ahmedabad Municipal Corporation is the sanctioning authority has not been challenged in the cross-examination of Sharma who has deposed to his authority. Sharma in his deposition also describes himself as the food inspector and that part of his statement was not challenged in the cross-examination. The documents produced in this case refer to Sharma as the food inspector. There is firstly the intimation given by Sharma to the appellant under rule 12 of the rules which has reference to the provisions of Section 11 of the Act. The intimation is given in form VI prescribed by the rules. That intimation is Exh 3. There is next the receipt passed by the appellant to the food inspector Sharma for receiving a sample bottle and also receiving the price of milk taken from him by Sharma. That receipt is Exh. 4. Then there are letters written by Sharma to the public analyst on the same date that is on 17-1-1966. Those letters are Exhs. 14 and 15. They are in accordance with the requirements of rule 17 of the rules and the letter Exh. 14 is in the form prescribed by that rule. In all these documents and also in the report of the public analyst, Sharma has been described as the food inspector of the area concerned. On these

facts which establish that Sharma occupies the office of the food inspector for the area concerned and performs the duties of that office, it would be permissible to presume that he was duly appointed to it. If so, it is also permissible to presume that he had the necessary qualifications for the appointment. These were not in the circumstances required to be further proved in the absence of a challenge to these facts. The first submission of Mr. Thakore therefore, cannot be sustained.

9. To appreciate the second submission reference may be made to the relevant provisions of Section 10 of the Act. Under clause (a) of Sub-Section (1) of that section a food inspector has power inter alia to take samples of any article of food from any person selling such article and under clause (b) he has power to send such sample for analysis to the public analyst for the local area within which such sample has been taken. Sub-Section (7) of that section in so far as material provided that where the food inspector taken any action under clause (a) of Sub-Section (1) of the Act he shall call one or more persons to be present at the time when such action is taken and take his or their signatures. The relevant rules so far as this case is concerned are rules 14, 15 and 16. I shall go to those rules presently and examine the contention whether some of those rules have not been complied with. But the contention of Mr. Thakore is that even on the assumption that the provisions of the rules have been complied with, unless the person who is required under the provisions of Sub-Section (7) of Section 10 to be called at the time of taking the action, and whose signature is to be taken, corroborates the complainant food inspector in all parts of the complainant's story the provisions of Sub-Section (7) of Section 10 cannot be said to have been complied with. It is not possible to accept Mr. Thakore's submission. The sub-section requires the food inspector to keep one or more persons present at the time when he takes action under clause (a) of Sub-Section (1) of that section and to take his or their signatures. If therefore the food inspector takes action accordingly the terms of Sub-Section (7) are satisfied. If later the person so kept present does not corroborate the food inspector the question that would arise only is whether the food inspector's story that he kept the person at the time when the action was taken and took his signature is to be accepted. The acceptance of that story is not by the Act or the rules made dependent on the person concerned supporting that story in a court of law. The court must decide that point on the facts placed before it and if on those facts the court comes to the conclusion that the food inspector did keep the panch present at the time action was taken as contemplated by Sub-Section (7) of Section 10 and did take his signature, that sub-section, must be held to have been complied with. This is as it should be, for the corroboration of a panch may not be available at the hearing before the court for more than one reason. The panch himself may not be available. He may have died in the meanwhile or may not be in a fit condition to come to the court or the panch though available has become subject to pressures which induces him to depart from adhering to what he had witnessed and subscribed his signature to. In all such cases the question really is whether the fact that a panch was kept present when action was taken and the fact that his signature was obtained were established by satisfactory evidence. It is the duty and function of the court to decide that question. The proof of these facts or the discharge of that function is not dependent on the readiness and willingness of the panch concerned and cannot

rest on his dictates.

10. Mr. Thakore's alternative argument is that even so if a panch witness does not corroborate the food inspector in respect of the observance of the formalities laid down by Sub-Section (7) of Section 10 and the other evidence is of witnesses who are interested, the court cannot hold that evidence sufficient for finding that those formalities were observed. Such a board proposition cannot be accepted. The question must always be whether the other evidence, notwithstanding the absence of corroboration from the panch witness, is sufficient to satisfy the court. I have referred to the testimony of the food inspector Sharma. He is corroborated by witness Dinkar Pawar. It is true that these two are not independent witnesses because Sharma would to some extent be interested in the successful conclusion of his detection of this case of adulteration and Pawar being his subordinate would like to support him. Mr. Thakore argues that they being thus partisan, witnesses their testimony cannot be held to be sufficient in the absence of independent corroboration in material particulars. He invited my attention to the decision in *E.Q. Barsay v. State of Bombay*¹, and he relies on the following observations in that judgment :-

¹ AIR 1961 SC 1762

"Both the courts had approached the evidence of Lawrence from a correct stand point. Though he was not an approver, he was certainly an interested witness in the sense that he was interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon such evidence without corroboration. It would be equally clear that his evidence was not a tainted one, but it, would only make a difference in the degree of corroboration required rather than the necessity for it."

On the basis of these observations Mr. Thakore argues that the evidence of a partisan witness is not admissible unless corroborated in material particulars. It is not necessary to discuss this point at length because the point has been dealt with by this court in *Bhanuprasad v. State of Gujarat*², where after considering that case and other decisions of the Supreme Court this court has held that as regards partisan witnesses there is no rule of law that their evidence cannot be accepted in the absence of independent corroboration in material particulars. The evidence of such witnesses should be scrutinised with care and there may be cases where the court as a matter of prudence will look for independent corroboration. Therefore, the broad proposition urged by Mr. Thakore that the evidence of a partisan witness is not admissible without independent corroboration in material particulars cannot be accepted. However, as both the witnesses in this case were concerned with the success of the trap and the panch witness has not supported them it would be prudent, on the facts of this case, to look for some corroboration to their evidence.

11. Now, the corroboration need not be by oral evidence but may also be from circumstantial evidence. Before I turn to the corroborating circumstantial evidence, I should like to refer to the evidence of panch witness Babulal Mohanlal.

[After discussing evidence His Lordship proceeded.] Considering the evidence as a whole there

is no difficulty in holding that the food inspector had complied with the provisions of Sub-Section (7) of Section 10 of the Act.

12. The next submission of Mr. Thakore relates to the alleged non-compliance by the food inspector of the rules relating to the sealing of samples. Those rules are rules 14, 15 and 16. Before examining these rules reference may be made to the relevant provisions in the Act as to the procedure to be followed by the food inspectors in taking a sample of food for analysis. Sub-Section (1) of Section 11 sets out three steps in the taking of the sample. The first step, set out in clause (a) is the giving of a notice in writing to the person from whom the sample is taken intimating the food inspector's intention to have the sample analyzed. The second step, set out in clause (b), is that except in special cases provided by the rules the food inspector shall separate the sample into three parts then and there and mark, seal and fasten each part in such manner as its nature permits. Therefore, the manner of marking, sealing and fastening on each part is not rigid but is to be such as the nature of the sample permits except when provision in that behalf is made in the rules. Section 23(1)(h) of the Act empowers the Central Government to make rules specifying the manner in which the containers for food purchased for analysis shall be sealed or fastened. Rules 14, 15 and 16 are referable to these provisions. Then the third step in the process, as set out in clause (c), is to deliver one part to the person from whom the sample is taken, send another part to the Public Analyst for analysis and retain the third part for

²(1965) 6 Guj LR 958

production in the court of law of for the analysis by the Director of Central Food Laboratory under Sub-Section (2) of Section 13 to which further reference will be made later. Now, rule 14 provides that :-

"Samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed."

Therefore, this rule requires that the bottles or jars or any other containers shall be clean dry and should be sealed in such manner as would prevent evaporation or entrance of moisture. It is not Mr. Thakore's contention that this rule has not been complied with. Rule 15 requires the labeling of the bottles. It states that all bottles or jars or other containers containing samples for analysis shall be properly labeled and the parcels shall be properly addressed and then it sets out what should be the details on the label. It is not Mr. Thakore's contention that this rule has not been complied with. Rule 16 on which Mr. Thakore's contention is based reads as under :-

"Manner of packing and sealing the samples –

All samples of food sent for analysis shall be packed, fastened and sealed in the following manner namely :-

- (a) The stopper shall first be securely fastened so as to prevent leakage of the contents in transit
- (b) The bottle, jar or other container shall then be completely wrapped in fairly strong thick paper. The ends of the paper shall be neatly folded in and affixed by means of gum or other adhesive.
- (c) The paper cover shall be further secured by means of strong twine or thread both above and across the bottle, jar or other container, and the twine or thread shall then be fastened on the paper cover by means of sealing wax on which there shall be at least four distinct and clear impressions of the seal of the sender, of which one shall be at the top of the packet, one at the bottom and the other two on the body of the packet. The knots of the twine or thread shall be covered by means of sealing wax bearing the impression of the seal of the sender."

The only provisions of this rule which according to Mr. Thakore were not complied with were the second part of sub-rule (b) and the whole of sub-rule (c). Mr. Thakore states that there was no evidence that the wrapper wrapped over the bottle was affixed by means of gum or other adhesive as required by sub-rule (b) or that it was secured by twine or thread which was fastened on the paper of the wrapper by means of sealing wax at four places in the manner required by sub-rule (c). It is true that the food inspector and the peon do not in terms speak of having followed this procedure as to gumming the wrapper and using twine or sealing at four places. But one of the three bottles was forwarded to the court and that bottle and its wrapper were separately identified by the food inspector in his deposition and separately exhibited as article A and Exh. 8 respectively. The food inspector was not cross-examined on that part of his testimony. The wrapper at Exh. 8 shows traces of gumming at the ends, and on the wrapped still sticking, are the twine and the seals at different places. When this was brought to the notice of Mr. Thakore he did not think it worthwhile to pursue his point.

13. Mr. Thakore's next submission was that a paper slip signed by the panch ought to be affixed on the cork of the bottle and as there was no evidence in this case of such a paper slip having been fixed to the bottle the prosecution evidence falls short of what is required by law Mr. Chhaya, the learned Assistant Government Pleader contends, that this point about the paper slips being not affixed is a question of fact and no such point was taken in the lower court and a decision invited thereon. It is no doubt a question of fact and had the matter been, on the facts appearing on the record, one of doubt whether or not there was a paper slip, the absence of such a contention in the lower court would justify this court in not entertaining Mr. Thakore's submission on the point. There is however visual evidence of absence of a paper slip on the seal of the sample bottle produced in court alongwith the complaint. That bottle is produced by the food inspector under the provisions of Section 11(1)(c)(iii). It was sent to the court apparently in a wrapper sealed in accordance with rule 16 and therefore if there was a paper slip signed by the panch in the cork it should be there Neither the food inspector nor the peon mentions the

existence of such a slip and the panch also speaks only of the signing of the label and the wrapper. On the evidence therefore it is clear that there was no paper slip signed by the panch affixed on the cork of the bottle and the question is whether the absence of such additional sealing is fatal to the prosecution case.

14. Mr. Thakore concedes that there is nothing in the provisions of the Act and the rules requiring such paper slips to be affixed to the corks of the bottles. Rule 15 requires the sample to be labelled. Rule 16 lays down in detail the manner of packing, fastening and sealing of the samples. The requirements of these rules have been observed and the food inspector has taken the signature of the panch on the label and the wrapper which are required to be affixed and wrapped under these rules. Any further precaution by way of applying paper slips signed by the panch is not required by the Act and is outside the provisions of the relevant rules. To accept Mr. Thakore's contention that paper slips have to be, nevertheless, affixed, would amount to importing a rule to that effect. But, says Mr. Thakore, there are two decisions of this court which lay down that paper slips signed by panchas shall be attached and therefore that is the law. The two decisions relied on are one of Divan, J. in *Shankerlal Prabhudas v. M.G. Vyas*³, and the other of Mehta, J. in *State v. Babubhai Shah*⁴. As the latter decision only reaffirms the view taken in the first mentioned decision as regards affixing of paper slips it will be enough to refer to the relevant observations of Divan, J. in Criminal Revn Appln. No. 338 of 1964 (Guj). But to appreciate the observations it is necessary to mention the facts of the case. The accused in that case was proceeding on a cycle with a can of milk. He was stopped by the food inspector who took from him a sample of 700 ml in presence of two panchas and after dividing it into three bottles, to each of which he added 18 drops of formalin, he sealed and labelled the bottles and gave one bottle to the accused, sent one bottle to the Public Analyst and retained one bottle with him as required by Section 11(1)(c) of the Act. The report of the Public Analyst showed the milk to be adulterated. Now, in that case no signatures of the panchas were taken either on the labels affixed to the bottles or on the papers wrapped on the bottles. In the present case such signatures were taken. In the case

³ Criminal Revn. Appln. No. 338 of 1964 (Guj) D/-21-7-1964

⁴ Criminal Appeals Nos. 467 of 1964 and 581 of 1964 (Guj) D/-31-3-1964

decided by Mehta, J. there were two infirmities. In the prosecution evidence. One was that there were no signatures of panchas on the bottles or on the papers wrapped in the prescribed manner under rule 16. The other was that there was no evidence that the Public Analyst compared the seals on the bottle and the outer cover with the specimen impression of the seals sent to him by the food inspector under rule 18. Rule 18 requires such a specimen impression to be sent and rule 7 imposes on the public analyst the duty to compare or have compared the seal on the container and the outer cover with the specimen impression received and to note the condition of the seals thereon. Because of these infirmities it was held that the prosecution had failed to discharge its burden of establishing the identity of the sample sent to the public analyst. Those infirmities are not present in the present case.

15. With these facts the observations of Divan, J. on which reliance is placed may be referred to. It was urged before him on behalf of the accused that it was not established by the prosecution that the signatures of the panch witnesses were taken either on the sample bottle or on paper seals affixed on the sample bottle. His Lordship said that it was nowhere provided in the Act or the rules that such signatures should be taken on paper seals. It was however necessary for the prosecution to establish that the sample which reached the analyst was the very sample which was seized from the accused in that particular case. His Lordship then made the following observations which are relied on by Mr. Thakore.

"As a safe-guard against tampering it is necessary that the bottle should be sealed properly and, in my opinion, one of the best methods of preventing such tampering after the sample is put in a bottle and is sealed, is to obtain the signatures of the panchas on the paper seal affixed to the bottle and so long as that paper seal is undisturbed between the time that it is put on the bottle in question by the Food Inspector and reaches the Public Analyst intact, it is clear that there would be no tampering with that particular sample from the time it was seized and put in the bottle till the time that it reached the Public Analyst."

The whole idea of obtaining such signatures on paper seals on sample bottles, the learned Judge pointed out, is to secure protection which the law contemplates against tampering. As there was no evidence that this particular type of protection against tampering with the sample was observed, the identity of the sample which was analysed by the public analyst with the milk seized from the accused was held not to have been established and the accused was acquitted. It will be noticed that the decisions in these two cases were based on the facts of those cases where the normal precaution of taking the signatures of the panch on the label and the wrapper was not taken. It will be noticed that His Lordship did not lay it down as a rule that paper slips signed by panchas should be affixed but considered it to be one of the best methods of securing the identity of the sample taken with the sample analyzed by the public analyst. The ratio of the decision is that the prosecution must establish that the substance which reached the public analyst is no other than the substance which was taken as a sample by the food inspector except for the addition of the required preservative where necessary. That clearly admits of no argument. Divan, J. only pointed out one of the best methods that could be employed so as to eliminate any doubt on that score. The food inspector would be well advised to follow that method but that does not mean, as has been suggested in argument before me that if the precaution recommended by the learned Judge is not followed the inevitable conclusion must be that the prosecution has failed to establish that the sample which reached the public analyst was the sample taken whatever other precautions may have been taken Whether or not the sample was the same must be determined on the facts of the case.

16. The relevant facts of the present case may again be noticed. The sample was taken at about 6.15 A.M. All the procedure laid down by the Act and the rules was scrupulously followed. The

label on the sealed bottle was signed by the food inspector and the panch. The wrapper on the sealed and labelled bottle was after the prescribed sealing signed by the panch. There is nothing to indicate that in spite of the signatures of the panch and the food inspector on the wrapper there was scope for tampering. Moreover, the sample bottle was personally handed over by Sharma to Vaghela at 11-30 A.M. and at that time the memo and specimen of seals was also given to him and Vaghela compared them and found they tallied and the seals on the bottles and the wrapper were intact. The period between 6-15 A.M. and 11-30 A.M. is not so long as to excite suspicion. Nothing has been urged against Sharma and this was not the only case in which he had taken a sample on that day before 11-30 A.M. He had taken 3 other samples and all the tout samples were handed over to Vaghela along-with relevant memos. In the memorandum Exh. 14 he gave to Vaghela under rule 17 the details of all the four cases. The present case was the third case. It will be noticed that the food inspector took all reasonable precautions and acted with despatch. All these facts considered together negative a reasonable possibility of tampering. No case of tampering or a reasonable possibility of it was alleged in the lower court. In the cases decided by Divan, J. and Mehta, J. earlier referred to, such a case was made in the trial court and the prosecution could not get over the infirmities appearing in those cases. On the facts of the present case, therefore, it is not possible to hold that there was a reasonable possibility of tampering.

17. Mr. Chhaya invites my attention to some of the provisions of the Act which provides for a built-in guarantee against tampering. Under Section 11(1)(c) to which reference has already been made, one of the three bottles containing a third part of the sample, securely labelled sealed and wrapped in the same manner as the other two parts of the sample has to be given to the person from whom the sample has been taken and under Section 13(2) the accused can make an application to the court to end that part of the sample to the Director of Central Food Laboratory for a certificate and the court after ascertaining that the mark and seal or fastening as provided for in clause (b) of Sub-Section (1) of Section 11 are intact, may dispatch the part of the sample under its own seal to the Director who shall thereupon send a certificate to the court within one month from the date of the receipt of the sample specifying the result of his analysis. Sub-Section (3) of Section 13 provides that that certificate shall supersede the report given by the public analyst in respect of the sample sent to him by the food inspector for analysis, under Section 11(1)(c)(ii) and the proviso to Sub-Section (5) provides that the certificate of the Director shall be final and conclusive. If the report of the Director is in favour of the milk vendor and also goes to support the allegation of tampering by the food inspector of the sample sent by him to the public analyst, the food inspector could be prosecuted for an offence under Section 19 (9) of the Act. Therefore, these provisions provide for a built-in guarantee against tampering between the taking of the sample and its analysis by the public analyst Mr. Thakore argues that a similar argument was advanced before Mehta, J. in Criminal Appeal Nos. 467 and 581 of 1964, (Guj) but His Lordship held that that does not take away the burden which clearly lies on the prosecution to prove that the sample analyzed by the public analyst was the same as the sample taken by the food inspector. That is obviously so, in that case here were as earlier stated, two infirmities which affected the prosecution evidence. In cases where the prosecution evidence suffer from

infirmities which show that the burden placed on the prosecution in a criminal law has not been discharged, no importance can be attached to the built-in guarantee against tampering earlier referred to but where all that the prosecution is expected to do under the rules has been done and there are no circumstances from which a reasonable possibility of tampering could arise, the fact that the accused was by the law furnished with the means of exposing any attempt at tampering cannot be overlooked. In this connection, the observations of the Supreme Court in *Mangaldas v. State of Maharashtra*⁵, at p. 133 are relevant. Their Lordships, while dealing with the object of the provisions in Section 11(1)(a) requiring the food inspector to give intimation to the person from whom the sample is taken, say :

"The object of this provision is clearly to apprise the person from whom the sample is taken of the intention of the Food Inspector so that he may know that he will have the right to obtain from the Food Inspector a part of the commodity taken by way of sample by the Food Inspector. This is with a view to prevent a plea from being raised that the sample sent to the analyst was of a commodity different from the one from which the Food Inspector has taken a sample."

Therefore, when all the provisions in the law are read together they negative the argument that the absence of paper seals must of necessity lead to the inference that the sample could have been tampered with. That question as earlier stated depends upon the facts of each case.

18. Mr. Thakore submits that in this case the protection afforded by Section 13(2) of the Act was denied to the appellant by reason of the delay in the institution of the prosecution which delay has prejudiced his exercise of the right under that provision. Now, the offence in this case was committed on 17-1-1966, the sample was handed over to the public analyst on the same day and was also examined by him on that day. The report of the public analyst was prepared on the 25th January 1966. Then followed the procedure for obtaining the sanction of the competent authority. After obtaining that sanction the prosecution was instituted on 5-4-1966. The summons of the court was served on the appellant in June 1966. The argument is that during the five months that elapsed between the date of the offence and the date the summons was served the sample given to the appellant must deteriorate and therefore his right under Section 13(2) was prejudiced. Now, here again no questions on this aspect of the matter were put to the witness Vaghela who was the proper person to be questioned on the point and who would have been able to throw light on it. Mr. Thakore relies on the decision of the Madhya Pradesh High Court in *Gwalior Municipality v. Kishan Swarup*⁶, That also was a case of alleged adulteration of milk. There the sample was taken on 10-5-1960, was analysed by the public analyst on 19-8-1960 that is after 8 days and the prosecution was instituted on 21-8-1961 that is after

⁵ AIR 1966 SC 128

⁶ AIR 1966 Mad Pra 180

16 months. Now, the prescribed quantity of formalin

under rule 20 was at the time 2 drops per ounce of milk but in the Madhya Pradesh case the formalin added was one drop per ounce of the sample that is half of the prescribed quantity. It appears that after the accused was served with the summons he availed himself of the right given to him under Section 13(2) of the Act and at his request the sample bottle produced in court by the prosecution was sent to the Director Jivajee Industrial Research Laboratory, Gwalior. As the curd formation in the sample had already taken place the analysis of the sample could not be carried out. Thus by reason of the delay of about 16 months the accused was deprived of exercising his valuable right in getting the report of the public analyst tested, as contemplated by Section 13(2), for no fault of his. On these facts the acquittal of the accused by the lower court was upheld. The grounds on which it was upheld were firstly that by reason of the inordinate laches of the prosecution the accused was denied his valuable right arising under Section 13 to have the report of the public analyst tested by the report of the Director and secondly that the formalin added to the sample was only half of what was prescribed by the rule and that the public analyst examined the sample after 8 days and therefore for both these reasons the report of the public analyst could not be held to carry weight. If the report could not be relied on, the prosecution naturally failed. In the present case the facts are different. The appellant did not avail himself of the right under Section 13(2) to have the sample either lying in court or in his possession examined by the Director. Again, in the present case the public analyst had examined the sample sent to him on the same day on which the sample was taken. Moreover, the formalin added in the present case was very near the prescribed quantity. The prescribed quantity is set out in rule 20. That rule in so far as material provides that the preservative used in the case of a sample of any milk "shall be the liquid commonly known as 'formalin' that is to say a liquid containing about 40 per cent of formaldehyde in aqueous solution in the proportion of 0.1 ml. (two drops) for 25 ml. or 25 grams". Before 1965 the last part of the rule read "in the proportion of one drop for one ounce of the sample." With the new system of measure it was amended to read in the proportion of 0.1 ml. (two drops) for 25 ml. or 25 grams." Therefore, the old quantity of one ounce has been equated with 25 ml. or 25 grams. But as regards the formalin two alternatives are kept in the rule namely 0.1 ml. or two drops. In the present case the total quantity taken was 700 ml. and therefore the quantity of formalin to be added under the rule would in drops, be 56 drops. As 16 drops per bottle was added the total quantity added was 48. I shall point out presently that the quantity added was not inadequate particularly when the milk sample was examined by the public analyst on the same day. Therefore, the facts of this case are different from the facts in the Madhya Pradesh case, and it is not possible to uphold the contention that the appellant was prejudiced in the exercise of his right under Section 13(2) and that consequently no weight could be attached to the report of the public analyst.

19. Mr. Thakore argues that even so the delay in the institution of the prosecution must by itself be treated as fatal because the Act contemplates early prosecution. He invited my attention to the rules 4 and 7 of the rules. Rule 7 lays down the duties of the public analyst on receipt of a package containing a sample for analysis from a food inspector or any other person. Sub-rule (3) provides that after the analysis has been completed he shall forthwith supply to the person

concerned a report in Form III of the result of such analysis. Rule 4 relates to analysis of food samples received by the Director and lays down the procedure in respect of the forwarding of the sample, the marking of the sample with a distinguishing number etc Sub-rule (5) on which reliance is placed reads "After test or analysis, the certificate thereof shall be supplied forthwith to the sender in Form II." These provisions, Mr. Thakore states, which require the public analyst or the Director, as the case may be, to supply the certificate forthwith indicate the anxiety on the part of the legislature to see that the prosecutions are instituted as early as possible. There is substance in that submission, but it is significant to notice that no time limit for analysis by the public analyst has been prescribed under the Act or the rules. The only time limit prescribed is in respect of the analysis by the Director in respect of the sample sent to him under Section 13(2). He is to send the certificate to the court in the prescribed form within one month from the date of the receipt of the sample. No doubt the absence of any time limit for examination by the public analyst of the sample sent to him does not mean that the public analyst may take any length of time. If he is required to send his certificate forthwith on analysis it is to some extent implicit in the provision that his examination should not be unreasonably delayed. In Halsbury's Laws of England (Third Edition) Volume 17, para 869, to which Mr. Thakore has invited my attention it is stated that the public analyst must analyse as soon as practicable any sample of food procured in his area by a sampling officer. This is as it should be if the report of the public analyst is to carry the weight that attaches to it. Mr. Thakore does not say that the analysis by the public analyst in the present case was delayed but his contention is that the institution of the prosecution is delayed. Now, here the prosecution was instituted about 2½ months after the sample was taken. Here again no point was raised in the lower court or facts sought to be brought on record which would go to show that a period of 2½ months for instituting the prosecution was unreasonable. If the point had been raised the question whether the period of 2½ months is longer than what could be taken and whether that period is explainable, could have been examined in the light of the evidence on the point in the lower court. It is not possible to hold on the evidence that there has been such a delay in the present case as to affect the weight to be attached to the report of the public analyst.

20. Mr. Thakore's next argument is that in any case no weight could be attached to the report of the public analyst as the formalin added was not the prescribed quantity. I have referred to rule 20 which prescribes the quantity and to the quantity which was in fact added. Mr. Thakore's argument is that the rule as to quantity of formalin must be strictly followed and if not followed no reliance could be placed on the report of the public analyst. In support of that argument he again relies on the Madhya Pradesh case above referred to. I have pointed out how that case has no application. Mr. Thakore says that even so the fact of inadequacy of formalin remains and there is no knowing that the milk sample did not deteriorate between the time the sample was taken and the time it was analyzed. He argues that milk deteriorates rapidly and therefore unless adequate preservative is added the risk of deterioration cannot be overlooked. He invited my attention to certain passages from the book 'Bacteria found in milk' by Harvey and Hill quoted in the decision of the Nagpur High Court in *Dattappa v. Buldana Municipality*⁷, The passages show

that milk contains acid-producing organisms, that they cause an alteration in the character of the milk which ends in purification, that the bacteria multiply more rapidly at high temperatures than at low temperatures and the bacteria most

⁷ AIR 1951 Nag 191

commonly found in milk grow rapidly at temperatures above 60 F. and at that temperature the milk would become sour in 53 hours and at lesser temperature it will take longer for the milk to become sour. Therefore, it is pointed out by the authors, the composition of the milk undergoes a rapid change unless the milk is either pasteurized or unless it is sent to the analyst under refrigeration. Now, Mr. Thakore concedes that in that case the effect of addition of a preservative was not considered but his object in referring to those passages from the book of Harvey and Hill was that milk deteriorates rapidly in ordinary temperature and therefore if the addition of the preservative is less than the prescribed quantity, deterioration would start. He urges that there is no knowing that some deterioration had not, because of this defect, started by the time the sample was analysed in this case and at any rate the sample sent to the court or left with the accused could not be in a fit condition for analysis by the time the prosecution was instituted.

21. These submissions raise the question whether the formalin added in the present case was or was not adequate. Here again, the same difficulty arises namely that no questions at all were put to witness Vaghela. Mr. Thakore puts forward the theoretical argument that because rule 20 provides for two drops per 25 ml. of the sample of milk anything less than 2 drops for that quantity of milk does not give any immunity against deterioration. Mr. Chhaya's reply is firstly that the quantity mentioned in rule 20 is, having regard to the context, approximate and not exact and secondly that the addition of formalin which is slightly less than that prescribed under rule 20 would still be effective so far as the facts of this case go. In my opinion, Mr. Chhaya is right. Rule 52 defines a preservative as meaning a substance which when added to food, is capable of inhibiting, retarding or arresting the process of fermentation, acidification or other decomposition of food. In so far as the preservative prescribed under Rule 20 is concerned the object of adding that preservative is laid down in rule 19 and that object is to maintain the sample in a condition suitable for analysis. It is with reference to that object that the adequacy of the preservative has to be considered. Now, the material portion of rule 20 has been earlier set out. Mr. Chhaya states that when the rule speaks of formalin as a liquid containing about 40 per cent formaldehyde in aqueous solution, it indicates that the percentage of formaldehyde is not required to be precisely 40 per cent but may be near about it and the preservative would nevertheless be under the rule a good preservative. Mr. Chhaya then points out that under the rule the proportion given is in two kinds of measure namely millilitres and drops and as there is no definition of a drop and one drop may slightly vary in measure or volume from another depending upon the method used for adding the drop it is reasonable to infer that what was excepted was substantial compliance with the rule and not a rigid compliance. On the language of rule 20 it appears to me that there is substance in the submission of Mr. Chhaya. That submission derives support from certain text books as to the effectiveness of formalin to which my attention has been invited. Mr. Chhaya relies on the observations made by the authors Leach and Winton in their book "Food Inspection and Analysis," fourth edition. At pages 163 and 164, the authors give the result of comparative

tests carried on by them in respect of milk to which formalin was added, the milk being kept during the experiment at the temperature of the room, which at that season of the year (February) was about 20° C. The preservatives were added about five hours after milking. The experiments showed that if one part of formalin is added to 10000 parts of milk, the milk would remain sweet for 5½ days. If one part of formalin is added to 5000 parts of milk, the milk would remain sweet and would not curdle for 10½ days. If one part of formalin is added to 2500 parts of milk, the milk would remain sweet and would not curdle for 55 days, the acidity upto that time being nearly normal. Mr. Thakore's reply to these figures is that the tests were carried out under two conditions namely that the preservative was added about 5 hours after milking and that the milk was kept during the experiment at temperature of 20° C. He therefore, says that these figures did not necessarily establish that the formalin added in the present case was adequate. He invited my attention to the book "Milk and Milk Products" by Eckles, Combs and Macy. At page 375 occurs the following passage on which reliance is placed :

"Formalin (40 per cent solution of formaldehyde) is a very effective antiseptic and preservative. Since formalin comes in a liquid form, it is very convenient to handle. Approximately 1 milliliter or 28 drops will serve as a preservative for 1 quart of milk for a week or more".

Now, a quart of milk is equivalent to 946.33 ml. Therefore on this ratio two drops would be sufficient as a preservative for about 67 ml., of milk for a week or more. Incidentally it may be noticed that here one ml. is stated to be equivalent to 28 drops whereas in Rule 20. 0.1 ml. is equivalent to 2 drops. Therefore, that again indicates that the requirement as to two drops is approximate. It is obvious that even on the authority relied on by Mr. Thakore two drops for 25 ml. which is the prescribed quantity under rule 20, was a sufficiently high proportion. The scheme of the Act also indicates that a sufficiently high proportion must have been prescribed so as to ensure as long an immunity from deterioration as possible. I have earlier pointed out that no period is prescribed in the Act or the rules for the public analyst to examine the sample sent to him for analysis. After the public analyst has examined the sample, which it may be assumed he will do as early as practicable the formalities relating to the obtaining of the sanction of the competent authority for the prosecution have to be gone through because otherwise under Section 20 the prosecution cannot be instituted by the food inspector. After the prosecution is instituted both the milk-vendor and the complainant have a right under Section 13(2) to have the report of the Director on any of the other two samples and the Director is given a period of one month from the date of the receipt of the sample by him to submit his report. Therefore when the rules, which under Section 23 are required to be framed in consultation with the expert committee constituted under Section 3, provide for addition to two drops per 25 ml. of milk, it may be assumed that the rule-making authority was aware of the time that is likely to be taken before the report of the Director which is made under the Act final and conclusive is available and during that period the sample must be maintained in a condition suitable for analysis as contemplated by rule 19. The scheme of the Act therefore indicates that two drops of formalin

per 25 ml. would not be the minimum but must be much higher than the minimum. That this is so is clear from the observations in the text books to which both Mr. Chhaya and Mr. Thakore have referred. Reference may now be made to the decision in *Ram Dayal v. State of Madhya Pradesh*⁸, to which my attention has been invited by Mr. Chhaya. In that case one drop of formalin was added per ounce of the sample of milk. The argument advanced on behalf of the accused there was similar to the one advanced here. The argument was negated. His Lordship relied on the observations of Edward R. Ling in his book. "A text book on Dairy Chemistry" where it was pointed out that formalin should be added at the rate of one millilitre per quart sample. These findings seem to agree with the findings in the book by Eckles, Combs and Macy earlier referred to. It is therefore reasonable to conclude that when rule 20 prescribes two drops it provides for a fairly high degree of immunity and

⁸1966 Cri LJ 1090 (Madh Pra)

what is expected is that the rule be substantially complied with. No doubt where the rule is not in terms complied with and the prosecution relies on substantial compliance, the prosecution must prove that the compliance is substantial and has not affected the sample. In the present case the sample was examined by the public analyst on the same day and it cannot be said that even for this short period in spite of addition of formalin of the quantity earlier mentioned, the sample was not maintained in a condition suitable for analysis. In fact there is the positive evidence of Vaghela that the sample was fit for analysis. The argument that at any rate when the appellant was served with a summons namely in June 1966, that is about 5 months after the sample was taken, his part of the sample was not in a condition suitable for analysis is not available on the facts of the present case. Under these circumstances, there is no sufficient reason for not relying on the report of the public analyst in the present case. It is not necessary in this view of the matter to consider the further argument of Mr. Chhaya that even curdled milk could be analysed by the Director and the presence of solids, fat and non-fat, in such milk could be correctly estimated nor is it necessary to discuss the decision in *State v. Ratan Lal*⁹, to which he has invited my attention for the proposition that the non-mixing of sufficient quantity of preservative might make the sample unfit for analysis and examination but that by itself cannot bring about a reduction in the fat or non-fat solid contents of the sample of milk.

22. The last submission of Mr. Thakore is that the alleged bottle containing the sample which was sent to the public analyst was not produced in court and has not been identified and therefore there was a possibility at the public analyst's end of mixing of samples of different cases and the benefit of that possibility must be given to the appellant. He invited my attention to the decision of this court in *Jethaji Suvaji v. State of Gujarat*¹⁰, It was a case arising under the Bombay Prohibition Act where a bottle alleged to contain alcohol was seized from the possession of the accused. Four infirmities were noticed in the prosecution evidence. One was that the seizure of the bottle containing alcohol was not made in the presence of panchas although the police officer making the seizure had sufficient previous information and there were people in the shops nearby the place where the seizure took place. Another was that there was a delay of 3½ months in sending the bottle to the Chemical Analyzer for examination, a delay which justified the defense

in urging the possibility of the bottle being tampered with at the police station particularly when the sealing was not done in the presence of panchas. The third infirmity was that there was no evidence to show in what manner or how the bottle was sent to the Chemical Analyser and the last infirmity was that the police officer did not identify the muddamal bottle containing liquor before the court being the same which he happened to attach and being the same which he sent to the Chemical Analyzer for examination. Even the constable who carried the bottle also did not identify it nor did the Chemical Analyzer do so. The learned Judge pointed out that these infirmities must affect the prosecution chain. As regards the identification of the muddamal article the learned Judge stated. "The muddamal article in question before court has again to be identified by such witnesses so as to justify the court to believe that it was the same which was attached by the Police Officer and a sample whereof was sent to the Chemical Analyzer who examined it". Mr. Thakore relies on these observations. There is no doubt that the prosecution must eliminate any doubt as to the identity of the bottle the contents of which were analyzed

⁹ AIR 1964 Him Pra10

¹⁰(7 Guj LR 927)

and it is desirable that the public analyst in food adulteration cases should wherever feasible return the container with his report to enable its being identified before the court so as to eliminate any doubt that may arise relating to mixing up of containers at his end and a wrong sample being reported on. On the facts of this case, however, that possibility does not seem to arise. Four samples were taken by the food inspector. The evidence of the food inspector alongwith the memorandum (Exh. 14) forwarded by him to the public analyst under rule 17 and his covering letter Exh. 15, shows that these four samples were separately numbered being separately wrapped. They were personally handed over to witness Vaghela, Vaghela states that the sample at serial No. 3 of the memorandum at Ext. 14 was the sample relating to the present case and it is with respect to that sample that he deposes. The witness was not cross-examined on the point. The analysis was done on the same day and the witness says he got four samples from Sharma on that day. Under these circumstances, there does not arise any doubt as to the identity of the bottle.

23. For these reasons, the conviction of the appellant was correct and must be confirmed. Mr. Thakore urges that the sentence is severe and may be reduced. The only grounds he urged were that the appellant is a hawker and is young. There is no evidence on the record that he is a hawker and even if he was it is not quite clear how that justifies a reduction in sentence. The appellant is no doubt 20 years of age but there is nothing to indicate that the offence is ascribable to his young age. In fact he chose to go to the length of denying the very fact that a sample was taken from him by the food inspector. Therefore, on the record there are no special or adequate reasons for giving less than the minimum sentence.

24. The appeal is therefore dismissed.

Appeal dismissed.

